

AKIN GUMP
STRAUSS HAUER & FELD LLP

Attorneys at Law

TOM W. DAVIDSON
202.887.4011/fax: 202.955.7719
tdavidson@akingump.com

November 30, 2005

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: MB Docket No. 05-317
WPVI-TV, Philadelphia, Pennsylvania Facility ID No. 8616
TELEVISION STATION SECTION 339(a)(2)(D)(vii) WAIVER REQUEST

Dear Ms. Dortch:

ABC, Inc. ("ABC"), licensee of WPVI-TV and permittee of WPVI-DT, Philadelphia, Pennsylvania, Facility ID No. 8616, by its attorneys, hereby requests a six-month waiver ("Testing Waiver") of the April 30, 2006 digital signal testing implementation date ("April Deadline") to temporarily preclude satellite subscribers from conducting a digital signal strength test of WPVI-DT for purposes of obtaining a distant network signal. The Testing Waiver is sought pursuant to Section 339(a)(2)(D) of the Communications Act ("Section 339"), as amended by the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), and the November 17, 2005 public notice ("Waiver PN") released by the Federal Communications Commission ("Commission").¹ As further set forth herein, WPVI-DT's digital signal coverage presently is limited due to force majeure, *i.e.*, circumstances beyond its control—namely, a Commission calculation discrepancy and WPVI-DT's use of a low VHF channel as its post-transition digital channel. For these and other reasons set forth herein, ABC submits that grant of a Testing Waiver is consistent with Section 339 and is in the public interest.

¹ See 47 U.S.C. § 339(a)(2)(D) as amended by Section 204 of SHVERA; TV Station Requests for Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 to be Filed by November 30, 2005 or February 15, 2007, DA 05-2979, *Public Notice* (rel. Nov. 17, 2005) ("Waiver PN").

Ms. Marlene H. Dortch
November 30, 2005
Page 2 of 4

WPVI-DT Is Not Subject to the April Deadline. As an initial matter, ABC believes that WPVI-DT is not subject to the April Deadline. The April Deadline applies to network stations in the top 100 television markets that received their current digital channel as their post-transition channel or were found by the FCC to have lost interference protection.² WPVI-DT was awarded a tentative channel designation on its present analog channel and has not lost interference protection at this time. However, WPVI-DT requested a waiver of the Commission's replication deadline of July 1, 2005, and this request ("Replication Waiver Request") remains pending.³ If the Commission rejects the WPVI-DT Replication Waiver Request, WPVI-DT may lose interference protection. Given this possibility, WPVI-DT is filing the instant Testing Waiver out of an abundance of caution.

WPVI-DT's Signal Coverage is Limited Due to Force Majeure. To the extent that the Commission determines that WPVI-DT is subject to the April Deadline, ABC requests a Testing Waiver pursuant to Section 339. Section 339 provides that subject stations may obtain a temporary waiver of satellite subscriber digital signal testing if "the station's digital signal coverage is limited due to the unremediable presence of one or more" statutory criteria. One criterion considered is "force majeure."⁴ ABC requests a Testing Waiver for WPVI-DT on the basis of this criterion.

As set forth in its Replication Waiver Request, WPVI-DT believes that it fully replicates. However, an apparent calculation error could lead the Commission to conclude that WPVI-DT is not replicating. Specifically, the Commission considers the population served by WPVI-DT's initial DTV allotment facilities to be 9,907,662 instead of the actual 9,061,608, and thus underestimates WPVI-DT's replication percentage.⁵ WPVI-DT believes that the Commission arrived at this erroneous population count because WPVI-DT's as-built facility is not checklist-like when run in TV_Process or because it confused the population covered by WPVI-DT's allotment facilities with the population within its NTSC channel 6 Grade B contour. Ultimately, WPVI-DT believes that the Commission's population count is in error and that WPVI-DT fully

² See 47 U.S.C. § 339(a)(2)(D)(vii).

³ See Letter to Ms. Marlene H. Dortch, Secretary, FCC, from Tom W. Davidson, Esq., MB Docket No. 03-15 (filed July 1, 2005) ("Replication Waiver Request").

⁴ 339(a)(2)(D)(viii)(III)

⁵ See Table II of 1998 Station NTSC and DTV Replication Information, at 29 (rel. Dec. 21, 2004). Based on ABC's population count, WPVI's replication percentage is 100.13%; using the Commission's population count, which ABC believes to be incorrect, WPVI-DT's replication percentage is 91.57%. See Replication Waiver Request, Engineering Statement.

Ms. Marlene H. Dortch
November 30, 2005
Page 3 of 4

replicates if the correct population count is used. The Commission's apparent error is a circumstance that could not reasonably be anticipated by WPVI-DT and is beyond WPVI-DT's control. WPVI-DT has notified the Commission of this apparent error but it has not been remedied at this time.⁶ In this respect, to the extent the apparent error is not remedied by the April Deadline, WPVI-DT's signal coverage may be "limited due to the unremediable presence" of force majeure. Accordingly, pursuant to Section 339, the Commission should grant a Testing Waiver to WPVI-DT.

Grant of a Testing Waiver on force majeure grounds also is warranted because WPVI-DT's compelled use of a low VHF channel—a circumstance beyond its control—may limit its signal coverage. Initially, WPVI-DT was assigned out-of-core channel 64 as its DTV channel to accompany its low VHF analog channel 6. As the Commission has recognized, low VHF channels may not be suitable for DTV operation.⁷ However, given that (1) WPVI's DTV channel was out of core, and (2) no other feasible channel was available in the congested Philadelphia area, WPVI-DT ultimately was compelled to choose channel 6 as its post-transition channel, despite the allegedly poor characteristics of low VHF channels.⁸ WPVI-DT also obtained special temporary authority to test digital operations on channel 6. Early results of these tests showed that special problems still may exist with low VHF channels; however, these problems potentially could be remedied through a power increase and/or other adjustments. Accordingly, WPVI-DT plans to seek Commission approval to increase its power level for channel 6 digital operations in order to compensate for certain low VHF characteristics. WPVI-DT believes that it ultimately will be able to reach full replication using modified channel 6 facilities. In the meantime, however, WPVI-DT's signal reach could be limited if channel 6 does not perform as predicted, a circumstance beyond the control of WPVI-DT. Accordingly, the Commission should grant a Testing Waiver for WPVI-DT so that it may continue its efforts to use channel 6, which is in the public interest, without facing the prospect of digital signal strength testing during this uncertain time.

⁶ See Replication Waiver Request.

⁷ See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Report and Order*, 19 FCC Rcd 18279, n.129 (2004).

⁸ WPVI-DT's willingness to use channel 6 effectively resolved a channel dispute in the crowded northeast corridor involving four stations, and thus served the public interest.

Ms. Marlene H. Dortch
November 30, 2005
Page 4 of 4

Conclusion. For all of the reasons set forth herein, ABC respectfully requests that the Commission grant a Testing Waiver for WPVI-DT.

Please direct any questions or inquiries regarding this matter to the undersigned.

Respectfully submitted,

/s/

Tom W. Davidson, Esq.

cc: Nazifa Sawez, Esq.